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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 662

JOHN BUNDTE AND WILLIAM PHILLIPS,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF CALIFORNIA, AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 662

JOHN BUNDTE AND WILLIAM PHILLIPS,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF CALIFORNIA.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners herein named respectfully petition for a writ of certiorari to review a decision and judgment of the District Court of Appeal, Third Appellate District, of the State of California.

Statement of Case

The judgment here sought to be reviewed affirmed the Superior Court of Mendocino County which found the peti-

tioners herein guilty of the crime of rioting as charged in a Mendocino County indictment in three counts under Penal Code 404 of California,[1] and of assault with a deadly weapon under Penal Code 245.[2] The indictments, identical except for names, in each count of rioting and in each count of assault with deadly weapon read as follows:

(a) *The riot count:*

John Bundte and William Phillips are accused by the Grand Jury of the County of Mendocino, State of California, by this indictment, found this 13th day of February, 1947, of the crime of misdemeanor, to wit, violation of Section 404 of the Penal Code, to wit, riot, committed as follows:

That said defendants, John Bundte and William Phillips, between twelve noon and twelve-thirty PM. on the 30th day of January, 1947, in the said County of Mendocino, State of California, and before the finding of this indictment, acting together and without authority of law, did willfully and unlawfully, use force and violence disturbing the public peace and then and there threatened to use force and violence, which said threats were accompanied by immediate power of execution (R. 3).

(b) *The assault count:*

As and for a further, separate and distinct count and cause of action, being a different offense than the crimes hereinabove set forth in Counts One, Two

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[1] Penal Code of Calif. Sec. 404. "Riot" defined. Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.

[2] Penal Code of Calif. Sec. 245. Assault with deadly weapon: Punishment. Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable by imprisonment in the State prison not exceeding ten years, or in a county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment.

and Three hereof, but connected in its commission with Count Three, said defendants John Bundte and William Phillips are accused by the Grand Jury of the County of Mendocino, State of California, by this indictment found this 13th day of February, 1947, of the crime of felony, to wit, violation of Section 245 of the Penal Code, to wit, assault with a deadly weapon, committed as follows:

That said defendants, on the 4th day of February, 1947, in the said County of Mendocino, State of California, and before the finding of this indictment, did then and there, willfully and unlawfully and feloniously assault one Wilbur Pullen, a human being, by means of force likely to produce great bodily injury, to wit, by throwing rocks at said Wilbur Pullen with great force and violence (R. 5).

Thus the rioting counts charged that these petitioners "acted together unlawfully and willfully used force and violence in disturbing the public peace," etc. The felony counts 4 to 12 accused these petitioners in that they "willfully assaulted (certain individuals specifically named in each count) by means of force and violence likely to produce great bodily injury, to wit, *by throwing rocks*" (Italics added).

Each felony count, therefore, charged each petitioner-defendant with the direct and personal commission of a *specific act* definitively particularized therein. The charge was not in the general all-inclusive language of the statute, thus presupposing its commission in any of the possible statutory methods, but instead, the charge described with specific precision the particular act constitutive of the offense against which these petitioners would be called upon to defend.[3]

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[3] For a summary statement of the facts involving the subject matter of the trial below, reference is made to the brief in support of this petition appended hereto (p. 19, *infra*), and which, for the sake of brevity, will not be repeated here.

Pursuant to conviction under such counts, sentences were imposed by the trial court to run concurrently in the California State Penitentiary at San Quentin on the felony counts, and subsequently in the County Jail of Mendocino County on the counts of riot (R. 653-659).

Pursuant to California procedure, appeal was taken to the Supreme Court of that State (R. 13) and, by the Supreme Court under its constitutional power, referred to the District Court of Appeal, third Appellate District, for decision.[4]

The District Court of Appeal in its decision of September 28, 1948, affirmed the judgment of conviction below[5] (R. 687). Thereupon, petitioners applied to that court for a rehearing, earnestly urging error in its decision, both as to its construction of local law and as to Penal Code 31, its interpretation and construction of which petitioners insisted collided squarely with the Federal Constitution (14th Amendment) (R. 706-716). Notwithstanding a revision of its judgment acknowledging that defendants had filed motions for separate trials, the District Court of Appeal nevertheless took no note of the federal question so vigorously pressed in appellants' petition and again affirmed judgment of conviction of the court below (R. 716).

Pursuant to the reservation of the power of review in the Supreme Court of California (Calif. Const., Art. IV, Sec. 4), appellants sought relief in that court, resting their appeal in large part upon their position that the construction extended to Penal Code 31 by the decision of the Dis-

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[4] Pursuant to the Constitution of California and California law, appeal was originally taken to the Supreme Court. That court, for its convenience and expedience, may assign a cause for hearing to the District Court, reserving and retaining power to call the cause before it for hearing either before or after hearing in the District Court of Appeal, Const. of Calif., Art. VI. Pursuant thereto, for convenience and expedience, the Supreme Court of California assigned the cause to the District Court of Appeal, Third Appellate District.

[5] See supporting brief, subjoined hereto, for Opinion in full, p. 45, *infra*.

trict Court of Appeal constituted a basic violation of fundamental due process, (14th Amendment) (R. 717-731). The Supreme Court of California, however, with but one dissenting voice (that of Justice Carter) denied a hearing and review, thus affording to the decision of the District Court of Appeal a status of finality (R. 732, App.).

Neither the District Court of Appeal nor the Supreme Court of California, therefore, undertook to adjudicate or pass upon the constitutionality of the California statute, Penal Code 31, as extended and construed by the California court.

California Judgments Here in Issue and Dates of Entry Thereof

The judgment of conviction by the Superior Court for Mendocino County was entered on April 26, 1947. The opinion of the District Court of Appeal issued from that court September 28, 1948. Petition for rehearing in that court was denied on October 13, 1948. The Supreme Court of California denied appellants' petition for hearing therein October 25, 1948, thus affording to the decision of the District Court of Appeal a status of finality.[6]

Statement of Jurisdiction

Jurisdiction to review this cause (and the companion case of *Moore, et al.* v. *California*) is rested upon the statutes of the United States, 28 U. S. C. 344(b), now codified as New Judicial Code 1948, 28 U. S. C. 1257; 28 U. S. C. 2101(c), and Rule 38½, Supreme Court, November 15, 1948.

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[6] Though the federal question arising under the Constitution of the United States, 14th Amendment, was urged upon the District Court of Appeal and argued, that court took no note of the problem in its decision. Though the federal question was similarly urged upon the Supreme Court of California in petitioner-appellants' brief, that court likewise declined to pass upon the question.

There is here drawn in question the validity of a statute of California, the *operation whereof as construed in the decision* is repugnant to due process and to the Constitution of the United States (14th Amendment). It is not the validity of the statute, *per se*, but rather the particular construction and extension thereof by the California court below which is questioned. To employ it, as does the California court, in such a manner as to permit conviction of these defendants of specific acts definitely charged in the indictment, not by proof that they personally committed them, but by proof that such acts were committed by others present, is challenged as violative of due process. Petitioners are thereby deprived of freedom of assembly and of the right of peaceful picketing. In so far as criminal acts of others are *vicariously* imputed to them, they are again deprived of due process. To give to the California statute in question the reach and effect extended to it by the California court in the instant decision is to strip these defendants of their constitutional presumption of innocence. They are compelled, contrary to the 6th Amendment of the Constitution, to stand trial for an offense the nature of which was not described in the indictment and as to which they have not been informed.

Petitioners earnestly urge that the action of the State of California, as authorized and sanctioned by the decision here in issue, constitutes a denial of due process, guaranteed by the 14th Amendment to the Constitution of the United States and spelled out particularly in the 1st, 5th and 6th Amendments thereto. It is the position of petitioners that they were convicted in the state courts for acts, alleged to be offenses by the laws of California, with which they were not charged and of which they were not accused in an indictment; that furthermore, they were convicted for acts which they did not commit but which, under

the evidence, were committed, if at all, by other parties; and finally, that they were denied their fundamental right to the presumption of innocence and their right of peaceful picketing and free assembly vouchsafed them under the 14th Amendment, in that their lawful right to be present on a picket line was converted into *prima facie* evidence, or into a conclusive presumption, of incrimination for such acts of violence as may have been committed by others then present.

The problem here sought to be raised involves California Penal Code Section 31 which, in common with many similar statutes throughout the United States and with an analogous act of Congress, U. S. C. Sections 550 to 557, renders aiders and abettors guilty as principals. Petitioners do not challenge the constitutionality of that statute *per se*, nor when applied to a proper case. This Court has never, however, we submit, passed upon the precise issue which we here present.[7] In the instant case, had the indictment charged the act for which defendants were to stand trial with that specificity found in the *Moy* indictment, there would here be no complaint. It is the unwarranted and unprecedented extension of Penal Code 31, wrenching it out of its context, which renders it a vehicle for charging a specific crime on the one hand, and on the other basing a verdict of conviction upon proof that the acts charged were actually committed by others, not these defendants. Thus the statute is employed in all respects as a substitute for conspiracy, *while dispensing with the proof of the antecedent conditions necessary to make out conspiracy.*

It is now familiar law that the First Amendment, through the medium of the Fourteenth, protects the rights guaran-

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[7] A similar statute (28 U.S.C. 550-557) was before this Court in *Jin Fuey Moy* v. *U. S.*, 254 U. S. 189, but there a wholly different aspect of the problem was involved.

teed therein against state action or infringement. It is unnecessary to rely upon a similar premise so far as the Fifth and Sixth Amendments are concerned because petitioners predicate their right to a vindication of the guarantees thereof upon the principle that those rights constitute a basic criterion of fairness fundamental to and essential in all criminal trials within the protection of the due process clause of the Fourteenth Amendment.

Cases Illustrative of a Denial of Due Process, Deemed Applicable and Controlling Here

Cole v. *Arkansas*, 333 U. S. 196, 68 S. Ct. 514;
Kotteakos v. *United States*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557;
Moore v. *Dempsey*, 261 U. S. 86, 43 S. Ct. 265;
Townsend v. *Burke* (June 14, 1948) 334 U. S. 736, 92 L. Ed. 1231;
Brown v. *Mississippi*, 297 U. S. 278, 80 L. Ed. 682;
Chambers v. *Florida*, 309 U. S. 227, 84 L. Ed. 716.

Cases Condemning State Action Creating a Prima Facie Presumption of Guilt as an Invasion of the Presumption of Innocence.

Morrison v. *California*, 291 U. S. 94, 78 L. Ed. 672;
Bailey v. *Alabama*, 219 U. S. 219;
Manley v. *Georgia*, 279 U. S. 1;
M. G. & K. C. R. R. Co. v. *Turnipseed*, 219 U. S. 35, 31 S. Ct. 136

Stage at Which and Manner in Which Federal Question of Due Process Was Raised

At every opportunity, defendants vigorously objected to evidence of the acts of other parties. Such evidence the

trial court received under its supposition that, although the defendants were individually charged with committing certain specific acts, they might be convicted nevertheless under California Penal Code, Section 31, by proof that these particular acts were committed by others then present.

In their brief in support of their appeal to the District Court of Appeal, petitioners urged upon the District Court the decision of the Supreme Court of the United States in *Cole* v. *Arkansas* (decided March 1948), 332 U. S. 834, 68 S. Ct. 514, and insisted that that decision in principle as applied here controlled to render convictions in this case violative of fundamental due process. Upon the hearing before the District Court of Appeal, the issue with respect to due process and the 14th Amendment was extensively argued to the court both by counsel for the appellants and respondents (R. 747-748). Due process, as defined in *Cole* v. *Arkansas,* and the constitutional right of peaceful picketing and free assembly were likewise strongly urged upon the Supreme Court of California in petitioners' brief. Criticizing the construction extended to Penal Code 31 by the trial court and by the District Court of Appeal as resulting in founding a conviction not upon direct proof of the commission of the crime *particularly* charged, but upon proof resting upon mere physical presence on the picket line at the time in question, petitioners in their Petition for a Hearing by the Supreme Court of California stated:

> "What becomes of the right of peaceful assemblage? Are these rights constitutionally guaranteed to be at the mere hazard of some spontaneous, sporadic or impetuous act of violence, let us say, by some individual or by a misguided picket? That is not the law as defined by the Supreme Court of the United States in A. F. of L. *v.* Swing, 312 U. S. 321.
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"Thus to sustain the trial court's broad and sweeping application of Penal Code 31 would impinge gravely upon constitutional rights and privileges vindicated by the federal constitution and by a long and notable line of decisions of the Supreme Court of the United States."

Appellants' Petition for Hearing, pp. 12, 13 (R. 724)

The principles derivable from the decision of this court in *Cole* v. *Arkansas, supra,* were discussed at pp. 13, 14, 15 and 16 of appellants' Petition for Hearing to the Supreme Court of California. Finally, in that petition we stated to the Supreme Court of California (p. 22, Petition for Hearing) (R. 731):

"To employ Penal Code 31 to deprive defendant of his right to know the essence of the offense for which he must answer is fundamentally a violation of due process under the 14th Amendment. It serves to subject him to incrimination, not for his own acts, but for the acts of others."

Squarely raising the issue of due process we, in our Petition to the Supreme Court of California, said:

"The vice of which we here complain was recently contained in a decision issuing from the Supreme Court of the United States, that of *Cole* v. *Arkansas* (March 8, 1948), 333 U. S. 196, preliminary print." Petition for Hearing, p. 13 (R. p. 724).

The impact of this problem upon due process and the 14th Amendment was thoroughly argued to the District Court of Appeal both by appellants in their Opening Argument, also by the Attorney General, and in appellants' Closing Argument (R. 742-748).

In the course of argument, appellants stated to the Court: (R., Argument, p. 748) (referring to quotations from *Cole* v. *Arkansas*, 333 U. S. 196, 68 S. Ct. 514).

"What application does it have? So far as due process is concerned, we too are charged with assault with deadly weapon, to wit, a rock, but we are convicted of committing assault by evidence that others threw the rock while we were merely present. An instruction which permits the jury to bring in such a verdict is the vice of which we complain."

Nor did we fail to raise this problem in its essence in the trial court. The long record of the trial is replete with our objections to testimony of the acts and conversations of others, admitted by the trial court upon the assumption that they were competent to prove the guilt of these defendants. Rocks not alleged or proven to have been thrown by these defendants were admitted over the objections of these defendants. The record discloses a vigorous and straightforward statement of the grounds of our objections. While our objections do not by formal terminology refer to the 14th Amendment of the Constitution of the United States by name, they do nevertheless necessarily implicate and urge the very substance and essence of due process guaranteed by that amendment. Our objections inherently raised the problem of a fair trial, of a fair day in court, of a fair opportunity to meet the particular charge levelled against the defendants in the indictment, all of which obviously and apparently go right to the heart of the question of due process.

Illustrative of our multiple objections to testimony of this character, we select one typical excerpt from the record. At the conclusion of the testimony of the prosecution's witness Wise, defendants' counsel stating grounds, moved the Court as follows:

Mr. Flood: I desire to move your Honor that the testimony of the witness Wise just concluded be stricken and the Jury instructed to disregard it entirely as to the defendant Phillips on the grounds and for the

reason that it has no relationship to the issues as far as the defendant Phillips is concerned and can only tend to confuse the jury as to the issues in this case or permit or suggest to the jury that it find its verdict with respect to the defendant Phillips upon the basis of acts and conduct of third parties, strangers, or persons not parties to this action, not defendants in this case or charged in the indictment.

I likewise move that all rocks and exhibits identified by the witness Wise, I think their Exhibits 20, 21 and 23, inclusive, be stricken, and that the jury be instructed to disregard not only as to the defendant Phillips but also as to the defendant Bundte, since the witness in his testimony declared that he had no rocks in his possession thrown by the defendant Bundte; that these rocks were not thrown by defendant Bundte; and that the rocks offered in evidence were not thrown by the defendant Bundte; and their admission, their reception into evidence, can only serve to confuse the jury—can only serve not only with respect to the defendant Phillips but also with respect to the defendant Bundte to suggest or permit the jury to find its verdict upon acts and conduct of parties not defendants in this action and not charged in the indictment. (R. p. 214).

The Court, ruling thereon, declared:

The Court: Well, I will tell you what I will do then, Mr. Flood. I will deny your motion without prejudice to make the same hereafter if it is not connected up. (R. p. 214).

Thereafter, defendants in the course of a comprehensive motion to strike all testimony of a similar character, moved specifically to strike that of the witness Wise:

Next as to the testimony of Mr. R. V. Wise . . . which in effect pointed out other parties than these defendants . . . be stricken from the record . . . it is irrelevant, incompetent, and immaterial to any issue

before the court . . . defendant Phillips was not mentioned therein as having acted together with Bundte as to any charge of assault with a deadly weapon. It could only tend to prevent Mr. Phillips in this case from getting a fair and impartial trial before this jury . . . You can not use the act or declaration of one party against another unless a conspiracy is charged, and it is not charged in this indictment as to any counts of assault with a deadly weapon. (R. p. 370) [8]

The substance of the constitutional problem here involved was, we submit, adequately presented within the requisites of the controlling holdings of this court:

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the U. S. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. (citing cases) *Bryant* v. *Zimmerman*, 278 U. S. 63, 93 L. Ed. 184."

See also,

Murray v. *Charleston*, 96 U. S. 432, 24 S. Ct. 760,

and,

Carter v. *Illinois*, 329 U. S. 173:

"A state must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. *Mooney* v. *Holohan*, 294 U. S. 103. Questions of fundamental justice pro-

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[8] As to the comprehensive motion to strike, cf. Record, pp. 367 to and including 376.

tected by the due process clause may be raised to use lawyer's language, *dehors* the records."

Constitutional Question Presented

Is it not a violation of substantive due process guaranteed by the 14th Amendment:

1. To charge these defendants not in the general language of the statute but with having personally committed a specific offense *definitively* described, but permitting the jury to convict on proof that such offense was not personally committed by them but by others then present?

2. To subject defendants' right to engage in peaceful picketing and free assembly to an onus and incubus so as to render defendants constructively culpable for violence, if any, on the part of others present on the picket line?

3. Is mere presence on the picket line, which itself is lawful, to be construed by the artifice of Penal Code 31 as *prima facie* evidence, or a conclusive inference, of guilt of aiding and abetting other parties present? Does not such *prima facie* evidence of guilt by association strip these defendants of their presumption of innocence with which due process clothes them?

Reasons for Allowance of the Writ

Review of the constitutional issue which we here present deserves, we respectfully submit, the consideration and attention of this Honorable Court. The question does not relate to a mere private matter. In essence, it presents a major problem of great public concern and it calls upon this Court to mark by clear delineation the limits beyond which state action may not reach in encroaching upon the liberties of the First, Fifth and Sixth Amendments, which have been recognized to embrace the fundamental elements of due

process guaranteed by the Fourteenth Amendment. The principle of protection against mass convictions, and the necessity for preserving individual presumption of innocence throughout, is here presented. The basic principle that each citizen is liable for his own acts, but not responsible for the acts of others, is here at stake. In the light of these considerations, we respectfully submit, therefore, that the problem here involved is one of substantial importance, the solution of which is essential to administration of criminal justice in conformity with concepts of constitutional liberty and due process.

Conclusion

For the reasons herein stated, petitioners pray that this Honorable Court issue a Writ of Certiorari to the District Court of Appeal, Third Appellate District, State of California, to the end that the question involved may be fully presented and justice done in the premises.

Dated, San Francisco, March 18, 1949.

Respectfully submitted,

GEORGE E. FLOOD.

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GORDON W. MALLATRATT,
Of Counsel.

Certificate of Counsel

I hereby certify that I am the attorney for the petitioners in the above entitled case, and that in my judgment the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, San Francisco, California, March 18, 1949.

GEORGE E. FLOOD,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 662

JOHN BUNDTE AND WILLIAM PHILLIPS, Petitioners

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the State Court

The opinion of the District Court of Appeal for the Third Appellate District of the State of California, constituting the final decision and judgment of the highest state court which may be had in this cause, filed September 28, 1948, 187 Adv. Cal. App. 829, 1023, is printed herein in the appendix subjoined hereto, p. 45, *infra*.

The opinion is confined entirely to a consideration and discussion of local law, and little note therefore need be taken of it here since it is not germane to the constitutional issues we here seek to present, except to comment upon certain important considerations which, in our judgment, the court in its decision disregarded. Both in the briefs

prior to the hearing and extensively in argument upon the hearing, as well as in petitions for rehearing (and in the petition and brief for review by the Supreme Court of the State of California), petitioners urged the force and controlling applicability of the decision of the Supreme Court of the United States then just recently published in *Cole* v. *Arkansas* (March 8, 1948) 333 U. S. 196. The District Court, however, in its decision devoted no consideration whatsoever to the principles of that case. It rejected petitioners' exceptions to the admission of testimony, photographs and rocks into evidence which were not identified as to any of these defendants.

The trial court, as we conceived it, failed to recognize that evidence of the acts of others, thus received under the supposed sanction of California Penal Code Section 31, had the effect of utterly destroying the value of defendants' evidence, cogently if not conclusively negativing personal participation in the acts charged in the indictment. The jury was authorized thereby to return a verdict of guilty upon the mere basis of testimony that the acts were committed by others—unnamed and anonymous—there present. Thus, guilt of third parties, not charged, was vicariously imputed to these defendants. And why? Because these defendants in association with others were present as pickets at the time such acts occurred.

Petitioners clearly pointed out, both in briefs and argument, that the statute, as thus judicially construed and applied to the specific acts charged in the indictment, when extended and applied to incriminate these defendants for the acts of one or more of thirty or forty pickets lawfully assembled for picketing purposes, served to permit and authorize the jury to convict these defendants of a crime in the nature of a conspiracy other than and different from the offense and acts charged. And conviction was founded upon proof, not of their own acts, but of acts

of others; or again, in ultimate analysis, upon proof not that they committed the acts thus specifically charged, but merely that they were present at the time when and the place where those acts, though perpetrated by others, were committed.

Jurisdiction

The jurisdiction of this court is invoked (as is more particularly set forth in the petition herein, pp. 5-8, *supra*), under the provisions of the statutes of the United States, 28 U.S.C.A., Section 344(b), as codified, New Judicial Code, 28 U.S.C. 1257; 28 U.S.C. 2101(3); cf. Rule 38½, Supreme Court, November 15, 1948.

> An appeal taken, or petition for writ of certiorari filed, seeking review of a judgment of a state court of last resort in a criminal case, shall be taken or filed within the *ninety* days prescribed in 28 United States Code Annotated, Section 2101(c), Approved June 25, 1948.
>
> So far as applicable, the general considerations and provisions of Rules 36 and 38 will control in respect to an appeal taken or petition for writ of certiorari filed in a criminal case from a state court of last resort. New Rule 38½ S. Ct. of the U.S.

In the petition for writ filed herein, petitioners have set forth in detail a statement of the particular grounds on which jurisdiction of this Court is invoked. Reference thereto is herein made (pp. 5-8, *supra*) and such grounds, without repetition here, are herein incorporated.

Statement of the Case

This case and its companion case, *People* v. *Moore, et al.*, consolidated with it for hearing before the District Court of Appeal for California, is the by-product of the longest strike in the history of northern California. It grew out

of a long course of picketing of certain redwood lumber operations in the northern counties of that State, and it represents the final chapter in that economic struggle which now happily has been completely and amicably adjusted so that the critical products of the redwood lumber industry are now again flowing normally in the channels of trade.

These defendants were members of the Lumber and Sawmill Workers Union, affiliated with the United Brotherhood of Carpenters and Joiners of America, A. F. of L. (R. 396, 566). That union had been on strike for more than a year, and through the entire period had engaged in the peaceful picketing of a large number of operators throughout the redwood area. The picketing throughout had been of an orderly nature. These issues grew out of the only two instances of violence occurring during that long and bitterly contested strike. These defendants served regularly upon the picket line throughout its course without complaint or incident. Among some forty-odd pickets present on the two occasions here in issue, these defendants found themselves singled out for a major prosecution and subjected to penitentiary sentences for a variety of acts occurring at the times and places here in issue, committed for the most part by any one or more of the forty present. Proof, however, as we have throughout earnestly contended, that these particular defendants committed any particular act, is wholly lacking. Their conviction, therefore, as we conceive it, rests *ultimately* upon the fact that they were present with others of the group of forty when some of these acts occurred. Under the instruction of the court, (R. 673-674) based upon the application—unwarranted, as these defendants contend—of P. C. 31 of the Statutes of California, the jury was permitted to convict these defendants without the necessity of requiring proof that they committed any par-

ticular act constituting the subject matter of any particular count. It is with the philosophy of such a conviction that we have respectfully, throughout these proceedings, taken issue.

At the trial, among the facts which appeared are the following:

The petitioners were present, along with some forty or more other pickets, about noon of January 30, 1947, peacefully picketing on the county road adjacent to the Hollow Tree Lumber Mill. While there, in the company of a deputy sheriff, an affray broke out some 400 feet removed from them, involving a clinch or scuffle between a nonstriker and a picket (R. 135, 325). The picket in question was not a defendant in this case. Despite the entire absence of evidence indicating any participation whatsoever by these two defendants in the affray (R. 49), they and they alone were charged as a result thereof with rioting, in the first count of this indictment. Despite nonparticipation on their part in the affray, the instruction of the court, under the terms of P. C. 31, enabled the jury to convict them of guilt therein by reason of their presence and their association with other pickets at the time and place in question.

A few hours later, these defendants were present with practically the same number of pickets—forty to forty-five —near the entrance of the Hollow Tree Mill (R. 67). About this time, a lumber truck and trailer approached along the county road from the west. As it did so, rocks were thrown at the driver by some of the forty to forty-five pickets then present (R. 67-68). One rock struck the driver, who stopped abruptly and, simultaneously with the throwing of the rock, fired a revolver (R. 68)—*but not at either of these defendants* (R. 83). The driver thereupon immediately pointed out to the deputy sheriff present an individual whom he alleged to have thrown the rock (R. 83-84, 549). *That in-*

dividual, McBroom by name, *was neither of these defendants.* This constituted the subject matter of rioting under Count 2, and again the vice of the jury's conviction of these defendants under this count, as we throughout have respectfully insisted, arises out of the application which the court gave to P. C. 31 throughout the trial, and the instruction which the court gave to the jury premised upon the wide scope attributed to P. C. 31 (R. 673-674).

Five days later, at Richardson's Mill, some 75 miles south of Hollow Tree, these two defendants were again present on the picket line early in the morning with some thirty other pickets. Some nine non-union employees of the said mill were riding to work between 7:50 and 8:00 o'clock that morning. As their cars approached the east and west entrances of the mill, some 400 feet removed from each other, a certain number of rocks (the exact number of which is indefinite in the record, but ranges from 10 to 15) were thrown at the non-strikers' cars (R. 263). One or two of the non-strikers were slightly injured. The evidence failed to identify either of these defendants as stationed at either of these two entrances during the few minutes in question.[9] It failed to identify either of these defendants as throwing any particular rock at any particular individual. There was cogent and persuasive evidence that each of them took no part whatsoever in throwing rocks, and certain vague evidence offered on behalf of the prosecution that they did so was, by physical evidence offered by defendants, established to be demonstrably incredible.[10] Yet, on these facts, convictions by

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[9] Objective identification was wholly lacking. Some of the prosecution's witnesses placed defendants at the west gate, while other prosecuting witnesses at the same instant simultaneously placed them at the east gate, 400 feet away (R. 190; 310-314; 362).

[10] The three prosecuting witnesses, Ray, Wise and Gibson, who at the time of trial undertook to identify defendants as throwing rocks at particular parties, each excluded from the court room under the rule while another was testifying, contradicted one another as to where each defendant

the jury were predicated in one count of rioting and nine counts of felony. It might very well have been, and in our judgment it is, indisputably true that the jury rejected the evidence of these prosecuting witnesses in its entirety. It convicted, nevertheless, and under the court's view of the effect of P. C. 31 it could have convicted these defendants even absent proof beyond a reasonable doubt (or, for that matter, any substantial proof of personal guilt) that they engaged in the assaults as charged in the indictment, but merely upon the fact that when the assaults took place they were lawfully engaged with some thirty or forty other pickets then present, some one or more of whom—many of them anonymously—threw the rocks in question.

To express our point concisely, the vice in the trial below, the vice in the trial court's ruling, the vice in the giving of the instruction based on P. C. 31,[11] the vice in the verdict, and the fundamental violation of due process occurred in this: The court, throughout the trial, admitted testimony of the acts of others present constituting assaults against the prosecuting witnesses named in the indictment; the court admitted exhibits consisting of rocks

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was located or as to "who" threw at "whom." Moreover, their testimony was effectively impeached by physical evidence that their vision was impeded by 600 feet of distance, a foggy morning, and intervening obstructions in the form of lumber piles. (R. 189, 190, 357, 344, 360, 362, 295, 310-314.)

[11] All persons concerned in the commission of a crime, who either directly and actively permit the act constituting the offense, or who knowingly and with original intent, aid and abet in its commission, or whether present or not, who advised and encouraged its commission, are regarded by the law as principals in the crime thus committed and are equally guilty thereof. One who does not actively commit the offense but who aids, promotes, or encourages its commission by act or counsel or both, is not deemed by law to be guilty and shall not be found guilty of the crime unless he did what he did knowingly and with criminal intent.

To abet another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting or aiding the commission of such criminal offense (R. 673).

thrown by other parties, without any evidence identifying them as having been thrown by the defendants in this case (R. 192-194); and the court admitted photographs evidencing assaults by other parties, not defendants, upon the cars of prosecuting witnesses, in support of the indictment charging assaults by these defendants. All of such evidence was admitted over the objections of these petitioners.[12] The court justified the admission of such extraneous evidence solely upon the basis of P. C. 31. It was then admitted by the trial court only upon the theory that though these defendants were not proved to have committed the particular assaults specifically described in the indictment, there was proof that someone among the thirty or forty then present committed them, that these two defendants were among the thirty or forty then present and necessarily, by virtue of that fact alone, guilty of aiding and abetting. Other than the fact of their presence, *nowhere is there any substantial evidence of any single act on the part of these defendants amounting to aiding, abetting, inciting or encouraging.*

Specifications of Error Herein Urged

The district court, in its decision and judgment, erred in sustaining the conviction herein in that the trial and conviction of these defendants violated constitutional due process guaranteed by the Fourteenth Amendment on the following grounds and in the following particulars:

1. Defendants' constitutional right to peaceful picketing and free assembly was jeopardized by the fact and to the extent that they were held constructively culpable for acts of violence, if any, by others present with them on the picket line. (For argument, see *infra*, pp. 26-32.)

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[12] Illustrative of our objection, see (R. 367-383).

2. Defendants were charged, not in the general language of the statute with violating California Penal Code, Sec. 245, but specifically with having committed an assault by throwing a rock at certain named persons. They were convicted, however, upon evidence that these acts were committed, not by them, but by others then present. (For argument, see *infra*, pp. 32-37.)

3. The defendants were deprived of their imprescriptible right to a presumption of innocence. In the manner in which the trial court applied and construed California Penal Code 31, their mere presence on the picket line at the time when someone—in many cases anonymous and unnamed—threw rocks, was rendered *prima facie* if not conclusive evidence of their guilt and of criminal responsibility for whatever rocks may have been thrown by others present. (For argument, see *infra*, pp. 37-39.)

4. Defendants were compelled to stand trial upon two misdemeanor counts charging rioting at Hollow Tree on January 30, 1947, joined with nine felony counts charging assault at Richardson's Mill, seventy miles away, on February 4, 1947. Under the trial court's instruction and application of P. C. 31, evidence relied upon for conviction of the rioting or misdemeanor counts at Hollow Tree was rendered competent to convict these defendants of felony counts of assault at Richardson's Mill, involving a wholly separate transaction, different parties, and dissimilar facts and testimony. Such joinder, when coupled with the radical extent to which the trial court applied P. C. 31, deprived these petitioners of due process and of the legal presumption of innocence. (For argument, see *infra*, pp. 40-41.)

ARGUMENT

1. Decision Below Violates Fourteenth and First Amendments by Assuming Guilt of ANY or ALL Present on Picket Line for Acts of Violence Committed by SOME Only.

The California court by its decision has, we submit, entirely over-simplified the scope and effect of Penal Code 31 as applied to the factual context existing in the instant case. It has taken the dictum of this statute to mean that, where assaults occur in the course of picketing otherwise lawful, any member of the picket line may be charged specifically with committing such an assault and guilt may be proved alternatively either by evidence of having personally committed the act of assault as charged or, in the event of failure of such proof, merely by showing that he was present on the picket line when such assault was committed. Thus the decision *assumes* that these defendants, present as they were on the picket line when violence broke out, were chargeable with the acts of all of the thirty or forty pickets present with them. The prosecution charged each defendant *personally* and *directly* with committing the act of *throwing a rock* at each of certain named prosecuting witnesses. Its proof, however, was not limited to showing the particular fact thus *definitely* charged. It sought to prove the guilt of these defendants of the particular act charged in the indictment by an immense volume of testimony that others, not these defendants, threw the rocks described in the indictment. Such proof was admitted by the trial court under the supposition that it was authorized by P. C. 31, and, by instructing the jury under the terms of P. C. 31, the jury was authorized to base a verdict of conviction upon such proof.

Implicit in the prosecution's case was the *assumption* that picketing throughout was unlawful. There was no attempt to prove, however, that the picketing was unlawful. The prosecution in the trial court indulged in a further *assumption.* It was *assumed*—no proof thereof was offered and none in the record exists—that all of the thirty or forty pickets there assembled were present for an unlawful purpose, scheme or plan—that is, that they had precedently conspired to assemble for the unlawful purpose of committing violence. This was a wholly gratuitous assumption on the part of the prosecution and the court. It was neither charged nor proved, nor was there any attempt to prove it, yet it colored the thinking of the trial court and conditioned the court's admission of the evidence complained of. It was evidence so received which permitted the jury, under an instruction premised upon the supposed scope of P. C. 31 to convict, even though the evidence failed beyond reasonable doubt to establish a personal commission of the acts charged in the indictment. Proof of personal guilt was unnecessary, so long as the fact of defendants' presence on the picket line was established. The trial court's theory and its instruction predicated on P. C. 31 rendered these defendants, if present, responsible for the acts of any and all others then present.

It is manifest that the trial proceeded by virtue of the trial court's view of Penal Code 31 in every respect and particular as though the defendants had been charged with a conspiracy *to assemble unlawfully* with thirty or forty others on the picket line and to engage with thirty or forty other pickets in acts of violence. This assumed premise was likewise adopted in its decision by the District Court of Appeal. Defendants were held, not for their own acts, but for those of every one of the thirty or forty present. Had

they been charged under the law of conspiracy, it might be said that they could be held legally accountable for the acts of others, but no conspiracy whatsoever was charged. The specific acts of assault were so definitely described as to put in issue only one thing: Were these defendants guilty, or were they not, of throwing the *particular rocks at the particular persons* named in the indictment? No unlawful concert between pickets was pleaded, nor was it proved; it was merely *assumed*. Having thus assumed an initially illegal assembly of pickets, it was comparatively easy for the prosecution to proceed to the next assumption: given an *assumed* illegality in the assembly of pickets, mere presence on the picket line denoted "aiding, abetting, encouraging and inciting", hence invoking P. C. 31 rendering abetters guilty as principals. This assumption operated to render the defendants guilty automatically as to each count specifically charging assault in the indictment. Thus it dispensed with the necessity of substantive proof of acts constituting the ingredients of each count thus charged. Presence on the picket line constituted *prima facie* if not conclusive evidence of guilt without the necessity of producing formal proof. It was not necessary to prove that the defendant threw a rock at any named prosecuting witness. It was enough if he were present when such a rock was thrown.

No matter how conclusively or convincingly each defendant might disprove any personal participation whatsoever on his part in the violence and in the affray,[13] he

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[13] Defendants effectively and objectively disproved the remote and obscure evidence by which the prosecuting witnesses sought to identify defendants. But for P.C. 31, its conclusiveness, we submit, would have prevailed in their favor. The evidence established that, at the time the violence was alleged to occur, prosecuting witnesses were unable to identify these defendants to the local municipal police, or to the state patrol (R. 537-539); and that the asserted identification at time of trial, three months

was trapped *ipso facto* by the fact that he was present on the picket line. Given the fact of presence, the fact of picketing, he was stripped of all defense. He was liable for the acts of all then present. He was shorn of any benefit of the presumption of innocence. He was automatically guilty. What we have said applies with equal force to each and all of the thirty or forty pickets then present. Had the prosecution so elected, it might have convicted any one of them upon precisely the same evidence relied upon here to convict these defendants, without any undertaking on its part to prove that any of them threw any particular rocks or assaulted any given individual.

Let us note the devastating effect upon the constitutional right of peaceful picketing. Under such a rule of law, pickets are present on the picket line only at the risk that some one or more of the pickets assembled shall not, upon his own or their own responsibility, spontaneously or sporadically, under the excitement of the moment, indulge or engage in some act of violence. Thus the plenary freedom of peaceful picketing and free assembly guaranteed by the First Amendment of the Constitution becomes but a conditional freedom—a freedom subject to a *condition subsequent*. Should a spontaneous or individual act of violence occur on the picket line, the lawfulness of assembly on the part of all present then ceases, irrespective of personal participation therein. Under such a theory, the acts of each then present are automatically imputable to all.

That this was the theory upon which the prosecution and the court, during the trial herein, proceeded appears clearly

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later, was objectively impossible, by reason of distance, fog and intervening lumber piles, obscuring and obstructing their line of vision. This evidence, however, lost value in virtue of the court's instruction under P.C. 31, which told the jury it might convict defendants upon proof of their mere presence, as aiders and abetters, though they committed no act of violence.

from the brief of the Attorney General submitted in the companion case, *Moore et al.* (pp. 16-20), to the District Court of Appeal. There it was said:

> "There emerged from the one criminal transaction two groups of principals, (1) the defendants herein and (2) those not defendants herein. Each member of each group, by virtue of his being a principal, aided and abetted each other member of both groups. Because of that fact each of these defendants stands accused and convicted in the dual role of principal as to himself and accessory to every other principal.
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> "Joint participation with those engaged in the commission of a wrongful act is strong evidence of aid and assistance.
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> "The standing shoulder to shoulder one with the other in active armed attacks upon the complainant witnesses in this matter is certainly evidence of effective encouragement and assistance.
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> "It has also been held that the fact that a person is present at the commencement of an assault without disapproving or opposing it, is evidence on which, in connection with other circumstances, it is competent for the jury to infer that he aided and abetted the act." [14]

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[14] We are mindful that the prosecution coupled certain evidence undertaking to prove that these or some of these defendants threw rocks with the application of P.C. 31. Hence, it argued that since there was some evidence that defendants threw certain rocks, it was sufficient to convict them on all of the multifarious counts by an instruction which told the jury that in throwing certain rocks the defendants were responsible legally for every rock thrown by everyone. We submit, however, that this distinction is too artful to be realistic. We have elsewhere herein pointed out that cogent proof disproving the state's evidence as physically incredible was offered to show that these defendants did not participate in the throwing of rocks. Such evidence, under the court's instruction based upon P.C. 31, lost all value since conviction, in final analysis, could rest upon the fact that the defendants were present at a time when rocks were thrown.

We submit, therefore, that the right of peaceful picketing and free assembly, protected by the First and Fourteenth Amendments, cannot thus be made the vehicle for imputing to the defendants criminal liability for the acts of others. The right of peaceful picketing, guaranteed under the First Amendment, has been so vindicated by decisions of this court that authority therefor scarcely need be cited. We limit ourselves to the leading cases of *A. F. of L.* v. *Swing* (312 U. S. 321) and *Thornhill* v. *Alabama* (310 U. S. 88), defining the constitutional character of the right of peaceful picketing and free assembly. We advert, likewise, to the case of *Milk Wagon Drivers* v. *Meadowmoor Dairies* (312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A. L. R. 1200), in which only sporadic acts of violence were specifically contained. The general right of others not participating therein to pursue their constitutional guarantee of peaceful picketing was not disturbed nor was any criminality for the acts of violence visited upon pickets not participating therein.

We think it germane in just a word or so to refer, by way of analogy, to the decisions of this court in recent years construing religious freedom which, correlatively with freedom of speech and assembly, is guaranteed by the First Amendment in a notable series of some twenty or more cases frequently identified as *Jehovah Witnesses* decisions.[15] In those cases, this court has recognized that the freedom guaranteed in the First Amendment stands highest in the hierarchy of constitutional guarantees and is subject to infringement by state action only upon the most stringent

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[15] These cases no doubt are so familiar as to render citation thereof unnecessary. In this connection, however, two cases are of special significance: *Marsh* v. *Alabama* (326 U. S. 501), and *Tucker* v. *Texas* (326 U. S. 517). In each case, this Court protected the right of freedom of speech, even in circumstances where the speech in question had its inception in trespass.

and urgent grounds—only upon a conclusive showing of clear and present danger. This court has struck down, in case after case, state action, whether by ordinance or otherwise, which tends even to the slightest extent to impinge upon the absolute reach of freedom thus guaranteed. Freedom of speech and freedom of assembly stand precisely upon the same grounds as freedom of religion. State action, therefore, whether legislative or judicial, which imposes a burden, encumbrance, hazard or risk upon the free exercise of the right of lawful picketing and free assembly constitutionally guaranteed, will not by this court, we submit, be tolerated. Defendants, by trial and decision of the California court, were deprived of constitutional due process (Fourteenth Amendment).

2. Defendants Were Convicted by Proof of Acts of Others, Not Proof of Their Own Acts

A most serious vice, as we conceive it, in this conviction thus sanctioned by the decision of the California court, is that of imputing criminal liability to a particular defendant for the independent acts of another. Under the circumstances prevailing in the instant case, to permit vicarious liability to be constructively fastened upon these defendants and to authorize it substantively and procedurally in other similar cases—particularly those involving concerted economic action, strikes and peaceful picketing—is but to introduce the thin sharp edge of the evil of "mass conviction". It is thoroughly to repudiate a concept to which Anglo-American jurisprudence clings—that of personal guilt and personal guilt only, guilt for personal conduct, immunity from guilt by the mere fact of presence or association. Nor would it do to say that this error was in anywise mitigated or cured by the court's instructions. The very fact that the court admitted testimony of the acts of others

present, that it received in evidence exhibits—the very rocks—thrown at the parties named in the indictment by others, not these defendants, and crowned it all by submitting to the jury an instruction premised upon Penal Code 31, was enough to authorize and instruct the jury that it need not found its verdict upon a careful, discriminating assessment of the guilt of the defendants, if any, and their own particular acts, but that it might find a verdict against these particular defendants based upon the acts of any or all of the parties then present. This, in its essence, is the incipiency of "mass conviction".

Kotteakos v. *U. S.*, 328 U. S. 750; cf.
Bridges v. *Wixon*, 326 U. S. 135;
DeJonge v. *Oregon*, 299 U. S. 353;
Hague v. *C. I. O.*, 307 U. S. 496;
Townsend v. *Burke*, 334 U. S. 736, 92 L. Ed. (Adv.) 1231 (a case in which a conviction was condemned by this court upon the ground that the trial court had indulged in *assumption* as to an essential ingredient of the offense without requiring affirmative proof thereof);
Cole v. *Arkansas*, 68 S. Ct. 514 33 U. S. 196;
Brown v. *Mississippi*, 297 U. S. 278, 80 L. Ed. 682;
Chambers v. *Florida*, 309 U. S. 227, 84 L. Ed. 724;
Lisenba v. *California*, 314 U. S. 219;
Ashcraft v. *Tennessee*, 322 U. S. 143, 64 S. Ct. 921; again, 327 U. S. 274, 66 S. Ct. 544;
Moore v. *Dempsey*, 261 U. S. 86, 67 L. Ed. 969;
White v. *Texas*, 310 U. S. 530, 84 L. Ed. 1342;
Glasser v. *U. S.*, 315 U. S. 827.

It is worthy to take special note of two or three of the foregoing cases.

In the *Kotteakos* case, the indictment in a single count charged defendants with a conspiracy to commit fraud in connection with obtaining loans or advances from the Federal Housing Administration. Although but one conspiracy was thus charged, the trial court allowed evidence of some seven or eight other conspiracies, all growing out of the same or related transactions, all cognate one to another, to go before the jury. This court set aside the conviction as fundamentally opposed to constitutional due process. Insisting upon the principle that, under our philosophy of law, conviction of crime can rest only on proof of personal guilt for acts personally committed, and pointing out the danger of mass convictions, the court significantly said:

> "Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal even as respects conspiracies. It is not a matter of mass application. * * * When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. * * * (The substantial right of the parties) in each instance was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others."

And again:

> "Here, if anywhere, extraordinary precaution is required not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually as far as possible from loss of identity in the mass."

The *Cole* case bears a very close analogy to our own. There again a conviction was set aside on the ground that it could not be permitted to rest upon evidence sufficient to prove guilt under one section of the statute where the

defendant was charged under another section, though very closely related and perhaps included in the first. The case stands in bold outline for the simple basic principle that one may not be charged with committing a certain criminal act and be held guilty thereof by proof of commission of a different act.

We think it germane, too, to notice the *Glasser* case. This again was a charge of conspiracy against three defendants. One defendant was not present when certain conversations between the other two, alleged to be binding upon him, occurred. Notwithstanding the apparent conflict of interest between that defendant and the other two, the court compelled all three to go to trial under the legal representation of one attorney. Glasser, complaining of a deprivation of the essentials of due process, carried his conviction in the court below to this court. This court, recognizing even in the conspiracy case the requirement that each is answerable only for his own acts, and not for the acts of others, set the conviction aside.

Due process of law, within the contemplation of the Fourteenth Amendment, we take to mean, among other things, the requirement that the accused shall be charged in an indictment and that he be given adequate information therein with respect to the nature of the charge, and a fair trial, with an opportunity to meet the facts or acts specified by the indictment as the ingredient of the charge. We shall not pause here further to discuss the meaning or content of the term "constitutional due process", for the question has so frequently been before this court in recent years as to render an extensive discussion unnecessary and presumptuous.

Measured by the requirements of due process, these defendants did not have, in our judgment, a fair trial—a fair day in court, as that term is comprehended in Anglo-Ameri-

can law. They were charged in the indictment with having committed a certain act alleged to be constitutive of a crime. They were compelled upon the trial, however, to defend against evidence alleging them to have committed a wholly different act or acts of a totally different character. They were charged, in effect, with one thing; they were tried for another.

We do not here discuss the validity of a statute such as California Penal Code 31 when confined to its own intrinsic function. The statute was only intended to serve the purpose of subjecting a person to punishment as a principal where, *by due process of law,* he is proven to have aided and abetted the principal in commission of the crime charged. Nor are we concerned with the problem arising had the indictment charged the defendants with the commission of a statutory crime in the general, all-inclusive language of the statute. We may assume, *arguendo* at least, that so to charge them would in law be taken to mean a shorthand description of all of the methods by which the statute could be violated and to serve as notice thereof. But we are dealing with a vastly different situation. Here the defendants were charged with having committed a specific act—a specific series of acts. In each instance, the act was that of hurling a rock at a given named individual. The specificity with which the charge was described excludes necessarily any possible notice, any possible assumption that the defendant would have to come into court prepared to defend against any other act than that specifically named. We would, therefore, have no quarrel at all with an indictment such as that before this court in the case of *Moy* v. *U. S.* (254 U. S. 189), where the defendant was charged first in the terms of the statute, and then specifically with having committed certain acts constituting aiding and abetting. Such a charge obviously is compatible with the traditional elements of due process. Had the

prosecution, however, in the instant case elected to hold defendants guilty or responsible for aiding and abetting, the indictment under which they here are charged and under which they here were compelled to stand trial, falls far short of the requirements approved by this court in *Moy* v. *U. S.* (*supra*). It falls short, we submit, of the basic fundamental requirements prescribed as a minimum of due process in the Sixth Amendment.[16]

We have, we earnestly submit, a serious grievance within the compass of constitutional due process over a conviction in the state court induced, in large measure if not entirely, by evidence that the particular crime with which these defendants were charged was, in fact, committed not by them but by others.

3. California Court Denied Petitioners Their Constitutional Right to a Presumption of Innocence and Conversely Attached to Them a Presumption Either PRIMA FACIE or Conclusive of Guilt.

We need not urge the importance of preserving the integrity of the principle of the presumption of innocence, nor need we cite the authority of decisions of this Court holding that the presumption of innocence constitutes a vital component of constitutional due process. These defendants were charged with having committed an assault by throwing rocks at some nine different given and named persons. Let us have in mind the full connotation of the presumption of innocence in this context. Let us say that the defendants threw a rock at one, but not at the remaining persons named in the indictment. To make out each

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[16] The valdity of our conclusion does not depend upon the premise that the Sixth Amendment is *per se* read into the due process clause of the Fourteenth. Its requirements, however, necessarily carry great weight and, when considered in conjunction with the impact of the requirements of the Fifth and First Amendments, upon the factual situation in this case, are, we deem it, conclusive.

count, the prosecution would necessarily have to establish affirmative, substantive proof of assault by means of throwing a rock against each of the nine persons. Assuming—and we deny the premise—that it was competent for the prosecution to convict the defendants upon proof that they aided and abetted, in lieu of proof that they personally committed the acts specifically charged, yet nevertheless, the principle of the presumption of innocence would require the prosecution to establish substantive evidence of these defendants aiding and abetting the commission by third parties of each of the acts thus charged in each count of the indictment. Proof of one, which falls short of proof as to each count, would be entirely inadequate. Even upon this premise, the prosecution did no more than to rely, not upon proof that these defendants participated, aiding or abetting any third party in the commission of the particular acts charged, but solely upon the proof that they were present, hence *ex necessitate* implicated and *ipso facto* guilty of each of the acts committed by any of the parties present. This court, we believe, will readily appreciate that the presumption of innocence may not constitutionally be thus abrogated or corroded by erecting an *artificial presumption of guilt to overcome* it in this context, and, under a different set of facts, this court has not hesitated to strike down state action—in many cases, legislative action—creating a *prima facie* presumption of guilt attached to the proof of a particular fact. We do not challenge the right of the state to render proof of one fact which intrinsically is inferentially probative of the existence of another fact *prima facie* evidence thereof. We are here, however, disputing the right of the state, whether legislatively or as here by judicial action, to render a fact which in and of itself is innocent of any criminal connotation, either a *prima facie* or a conclusive inference of the commission of a different and a criminal act. It is fundamental

to criminal jurisprudence that a circumstance, to be relied upon as an inference of guilt, must exclusively point to guilt and be irreconcilable with innocence. Mere presence, therefore, upon a picket line, where thirty or forty are assembled to carry out a lawful, constitutional function, can not thus artificially be treated as an evidence or inference of guilt. Contrary to the prosecution's theory in this case, presence upon the picket line, where the picketing was neither charged nor proven to have been unlawful, can give rise to no inference or finding of guilt. To presume *mens rea* from an act itself intrinsically lawful is, at one stroke, totally to blot out the presumption of innocence.

We shall not here prolong this discussion. It does, in our judgment, touch deeply upon a principle of greatest importance in the field of current criminal jurisprudence. Should the writ in this case issue, we would undertake to submit ample authority for the position we here urge. For the purposes of this supporting brief, however, we deem it sufficient to call this court's attention to the following cases and the principles which they support:

Bailey v. *Alabama*, 219 U. S. 219, 55 L. Ed. 191, 31 S. Ct. 145;

Tot v. *United States*, 319 U. S. 463, 63 S. Ct. 1241;

Manley v. *Georgia*, 279 U. S. 1, 49 S. Ct. 215, 73 L. Ed. 575;

Morrison v. *California*, 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 664;

McFarland v. *American Sugar Refining Co.*, 241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 899;

Mobile J & KCR Co. v. *Turnipseed*, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78;

U. S. v. *Warden of Clinton Prison*, 29 Fed. Sup. 486, Aff'd C.C.A. 2 108 Fed. (2d) 861, Cert. denied 309 U. S. 661, Rehearing denied 309 U. S. 696;

Cf. *Heiner* v. *Donnan*, 285 U. S. 312, 75 L. Ed. 772.

4. Utilizing Evidence Offered to Support the Prosecution's Charge of Rioting at Hollow Tree as a Presumption of Guilt of Felony Counts of Assault at Richardson's Mill Five Days Later Is Denial of Due Process.

With much earnestness we argued this question of law before the California court. We are confirmed in our judgment that the joinder of two such separate transactions as that of misdemeanor rioting at Hollow Tree on January 30, 1947, with felony counts at Richardson's Mill (near Willits, California), seventy miles away, five days later, constitutes a prejudice so deep and incurable as to amount to a denial of due process. Assuming, for the moment, evidence sufficient to convict under the two rioting counts, of what avail to these defendants would be evidence even of the most conclusive character of their non-participation whatsoever in the felony counts of assault at Richardson's? The application of P.C. 31 *vis-à-vis* such joinder, absent entirely any charge of proof of conspiracy, could only serve and did only serve to render these defendants automatically guilty of each and every count charged, irrespective of anything that might be done or said on their behalf in negation thereof. Once admit that these defendants actually were present at Hollow Tree and at Richardson's five days later, that fact alone operated as a presumption practically conclusive of guilt.

It is readily apparent that the trial court, affirmed by the California Appellate Court, viewed P. C. 31 as a substitute for conspiracy, dispensing, however, with the requirement, essential to conviction, under the law of conspiracy, that the charge be specifically pleaded and that the defendant thereby be notified that he is to be held responsible for the acts of his confederates. This plainly contravenes the express mandate of the Sixth Amendment of the Constitution of the United States. In over-ruling our motion

on misjoinder and in applying P. C. 31, the trial court went one step farther, consistent with its theory that P. C. 31 applied so broadly as to authorize conviction on each and all the counts charged, whether the testimony indicated that the acts charged were done by others or went no farther than to indicate that the defendants participated solely in the rioting counts at Hollow Tree and were merely present five days later at Richardson's.

We wish herein to preserve our objection on grounds of due process to such joinder. We do not, however, argue it here at any greater length for we conceive that the error is so manifest as to be *a priori* evident.

Conclusion

Should the Legislature of the State of California pass an enactment providing that anyone present with a group on a picket line at a time when some member of the picket line indulges in an act of violence will be held *prima facie* (or conclusively) guilty of aiding and abetting in the commission of such act of violence, no one would doubt that such a statute would necessarily be condemned by the principles of constitutional due process. It would fall before the reasoning of this court in cases such as *Tot* v. *U. S.* (supra), *Murray* v. *Charleston* (supra) and a long line of similar decisions. Although the result here ensued not from legislative but from judicial action, it is precisely analogous to the dilemma confronting these defendants upon their trial: lip and token service was paid to the presumption of innocence, but the actual construction which the court extended to P. C. 31 effectually served to deprive them of the benefit thereof.

Similarly, it would not be doubted that the Legislature of the State of California could not, consistently with constitutional due process, pass a statute permitting the prosecution to accuse a defendant with a crime by the commis-

sion of certain specific acts, and permit proof thereof upon trial by evidence of the commission of other and different acts; nor by proof that the defendant was present when someone else committed such acts. Such a statute would obviously likewise fall before all the traditional principles of constitutional due process.

Moreover, no one would suppose that the Legislature of the State of California possessed the power to render the right of a citizen to assemble upon the picket line conditional upon the subsequent event of whether or not some member of the picket line associated with him, spontaneously or otherwise commits an act of violence. Again, a violation of due process would be manifest.

These illustrations are by no means *reductio ad absurdum*. They are not fanciful. They are but a concrete application of the principles of constitutional law to the factual context of the instant case. They point up, in our judgment, the problem of due process which we submit as eminently worthy of the consideration of this honorable court.

Our advocacy here admittedly is on behalf of these instant petitioners, but we undertake respectfully to say that we are by no means concerned with a mere local or provincial issue. We conceive the problem here as broad and universal in its reach. It raises questions upon which, in our earnest judgment, this court may well pause and reflect. May we not consider that, as a result of conduct occurring among thirty or forty anonymous pickets engaged in what they conceived to be their legitimate and economic right to wage a labor dispute, these two defendant-petitioners—six in all, including the companion case of *Moore, et al* v. *California*—find themselves singled out for a major prosecution and subjected to penitentiary sentences of nine counts of felony—54 counts in all. Is this not, indeed, a tremendous total of felony convictions to follow from what incipiently

to many, if not all, of the participants, seemed an obscure, spontaneous and isolated incident?

Have we not a right to urge that these men—men who have honorable records as hardworking, home-owning family men, stably rooted in their communities—be accorded every safeguard of due process vouchsafed them by the law of the land, before they are suddenly wrenched from their environment and branded as felons? Have we not a right to insist that they be not so stigmatized by a pyramidal accumulation of acts and things done and said, not by them but by others; that they should not be swooped up into one vast dragnet made up of three rioting counts of misdemeanor and nine felony counts of deadly assault; made to stand trial on all of them jointly, charged with one set of specific acts but compelled to defend against the omnibus, nondescript acts of thirty or forty others present?

After all, these particular defendants are entitled to insist upon their full measure of constitutional protection, but it is not they alone who stand to suffer from the promulgation of the rule of law sanctioned by the decision of the California court. If this aberration, as we conceive it, from those milestones of Anglo-American law which so notably differentiated our criminal jurisprudence from the methods of the police or totalitarian state, be not remedied, then there is ready at hand a precedent where citizens anywhere, in large numbers and in populous areas, may be subject to the loss of their liberty by the mere mechanism of establishing their presence and association with a group itself legitimate, where and when some isolated or spontaneous acts of breach of the peace occur.

These are considerations which, in our judgment, warrant this court in granting a writ of certiorari.

Respectfully submitted,

GEORGE E. FLOOD,

Dated, San Francisco,
MARCH 18, 1949.
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APPENDIX I

(Vol. 87 A. C. A. 829)

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

3 Criminal No. 2024

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent

vs.

JOHN BUNDTE AND WILLIAM PHILLIPS, Defendants and Appellants

Opinion

The defendants were jointly indicted in three counts under Section 404 of the Penal Code for participating in riots, and in nine counts under Section 245 of that code for assaults committed upon different named persons by means likely to produce great bodily injuries, to wit, by the hurling of rocks. They were tried by jury and convicted of all counts, except that William Phillips was acquitted of the assault charged in the fourth count. The riots charged in the first two counts occurred on January 30, 1947, and the riot charged in count three, together with the assaults charged in the nine remaining counts occurred February 4, 1947. All offenses grew out of a labor dispute. The defendants, together with thirty or more union labor men, were engaged in picketing two adjacent lumber mills near Willets in Mendocino County. The assaults were made on non-union employees of the mills and upon one driver of a truck who was hauling lumber from another mill to Oakland. The assaults were made by the defendants and their associate pickets, acting together, upon the non-union workmen, by hurling rocks at them. Several of the workmen were seriously injured.

A demurrer to the indictment was overruled. Motions for a directed verdict and for a new trial were denied. The

trial commenced on April 14, 1947. Separate verdicts were returned against each defendant. Judgment was rendered accordingly. The defendants were sentenced upon each conviction of riot to the county jail for the term of 180 days, such sentences to run concurrently. They were also sentenced upon each assault of which they were convicted to state prison for the term prescribed by law, said sentences to begin at the expiration of the county jail sentences, and to also run concurrently. From said judgment the defendants have appealed.

The appellants contend that the counts for riots under Section 404 of the Penal Code, which are misdemeanors (Penal Code, sec. 405), were improperly joined in the indictment with the remaining counts of assaults to commit bodily injuries under Section 245 of that code, which are felonies. They therefore assert that the court erred in overruling their demurrer, and their motions for a directed verdict and for new trial, on that ground, and because of a lack of evidence showing that the defendants *acted together* in committing the riots to disturb the public peace *by means of force or violence*; that the evidence fails to show that the defendants personally threw the rocks that injured some of the workmen or damaged their automobiles; that the evidence fails to show they cooperated with the other strikers in commission of the offenses; that they should not have been found guilty of certain assaults in which they were not identified as personally hurling rocks, on the mere theory that they aided and abetted their associate strikers in committing the offenses; that section 31 of the Penal Code has no application to the circumstances of this case; that the court erred in instructing the jury in that regard, and that the court erred in admitting in evidence photographs of the rocks thrown and the automobiles damaged in said assaults.

The transcript contains 1000 pages of evidence. There is much conflict of testimony on the essential issues. The strike of union labor employees commenced about a month prior to the commission of the offenses in question, at two adjacent lumber mills near Willets in Mendocino County. It continued to the time of the commission of the offenses. The

riots charged in counts one and two occurred January 30, 1947, at the Hollow Tree Lumber Company mill located nine miles east of Rockport on the highway from Willets to Fort Bragg. The riot charged in count three and the assaults charged in the remaining counts occurred February 4, 1947, at Richardson Lumber Company mill situated on said highway two miles west of Willets. At the time of the affrays both mills were being operated by non-union workmen. Both mills were then picketed by a small number of men estimated at not more than ten men. At the time of the disturbances in question the number of pickets had been increased to 30 or 35 men. Most of the same pickets were engaged in all the affrays. The defendants were among those assailing pickets, and active in all offenses charged at both mills. When the foreman and non-union employees left the Hollow Tree Lumber Company mill at noon to go to lunch at the cook-house, some distance down the roadway, they were compelled to pass through the picket line, consisting of 30 to 35 men who had congregated at the entrance to the mill. The defendants were then among those pickets. An open lane was forced by a deputy sheriff through the crowd of pickets, along which the non-union workmen passed. The defendant Bundte held in his hand a switch which he was flipping back and forth to intimidate the passing workmen. The officer warned him not to strike anyone with it. No one was struck. The attitude of the pickets was clearly antagonistic. But the workmen passed the picket line without an assault. When they reached a point about one hundred yards down the roadway, George Sherrad, one of the strikers who had evidently been hiding there, suddenly stepped from behind a clump of bushes and hastened toward them. He was muttering and using "some pretty bad language." He bumped against Mr. Smith, who was in the lead, and deliberately "reached out and struck" in the face or slapped Charles Scaife, the mill foreman. Sherrad and Scaife then clinched and a scuffle ensued. They fell to the ground. Scaife's brother James tried to separate them. Sherrad "jumped on top of Scaife". Observing the affray, a large group of the strikers ran down there.

"Some of them had rocks and things in their hands." The defendants Bundte and Phillips were among them. The deputy sheriff also ran to the scene of the affray. "They all more or less arrived at the same time." There were several remarks passed by them (the strikers) about getting the "S. O. B. and words to that effect." William Smith testified, "The pickets came charging down the road, and there were sticks and stones in some of their hands. And they said 'Let's take the bastards' or words to that effect. • • • Mr. Bartolomei and John Bundte were one of the first there." The deputy sheriff testified that he heard the defendant Phillips say, "I hope George (Sherrad) gets the bastard," and that Bundte said to Sherrad "Poke the — —, George." He said he saw Sherrad when "Scaife had (received) this more or less of a haymaker"; that "Bundte reached down awful low • • • and he says • • • 'Reno, you seen who started this," to which the officer replied, "Yes, I seen who started this." The sheriff stopped the fight and told Bundte "You tell your men that there will be no more of this," to which Bundte responded by saying, "Men, there will be no more of this—*just as much.*" The inference is that Bundte thereby purposely encouraged "his men", the strikers, to continue the use of force and violence "just as much" as they desired. The strikers then returned to the mill, while the non-union workmen proceeded to the cook-house.

About two o'clock on the afternoon of January 30th, Ed Sands, who had been driving a truck for an Oakland firm for about eight years, reached the Hollow Tree Lumber Company mill with a heavy load of lumber chained to his truck and trailer, which he was hauling from Rockport to Oakland. He said he had been carrying a revolver, by permission, "ever since they tampered with the brakes in one of the other trucks." He was then driving along the highway past the entrance to the Hollow Tree Lumber Company mill at the rate of about 25 miles per hour. Robert Schenk, the treasurer of the last mentioned company, heard Sands' truck approaching. He said, "Apparently the pickets heard it too, because there were a number of shouts or statements that I heard that 'Here comes the truck.' • • • The ones

around the fire, and the others started to climb out of their cars. And there was lots of scurrying around and picking up of rocks, * * *." The strikers formed on either side of the highway in two groups. They were armed with rocks. Schenk said that he saw thirty of them on his side of the road, and that "I didn't see anyone on my side that didn't throw rocks." Sands testified that he saw 40 or 45 pickets waiting for him at that place. He saw them reach down and pick up rocks. He anticipated trouble, and he reduced the speed of his machine, threw a shell into his automatic revolver and laid it on the cushion by his side. When he reached a point about fifteen feet from the strikers, he said "they all started throwing rocks." A large stone crashed through the window of his cab and struck him with great force in the face. It broke his nose, cut his cheek, blackened his eye and stunned him. He was dazed, partially blinded and angry. He claimed that he identified the defendant Bundte as the man who threw that stone. He suddenly applied the brakes with such force that the cables which bound the lumber to the truck were loosened and the load slid forward, damaging his cab and jamming the doors. He seized the revolver and fired two shots toward Bundte without injuring anyone. He crawled through a window of his cab, with his revolver in hand, and proceeded to round up the assailants. Great commotion and wrangling ensued. The deputy sheriff soon arrived and quelled the disturbance. Sands stated that both Bunte and Phillips were among the pickets who attacked him, and charged Bundte with throwing the rock which struck him in the face, but Bundte called him a liar. Upon request, Sands promptly delivered his revolver to the officer, admitting that he fired the two shots after he had been struck. Two large rocks were found in his cab. They were identified and received in evidence. The rocks varied from the size of an egg to that of a cocoanut. That was the last assault on that day. All the pickets who were present participated in the assault upon Sands with rocks. Bundte and Sherrad appeared to be leaders in the affrays. Clearly, the strikers were the aggressors in both affrays, and the assaults appeared to have been deliberately planned with

a common purpose to intimidate the non-union workmen and to win their strike. Those episodes may not be defended on the theory of the right of peaceable picketing. They were unprovoked assaults by unlawfully hurling deadly rocks with the intent to inflict great bodily injuries and to damage machines. The picketing force had been greatly increased the morning of the first affray. When one of the defendants was afterward inferentially charged with throwing one of the rocks, he said they ought to have done it long before that time.

The third count charged defendants with the commission of a riot on February 4th, at Richardson Lumber Company mill. Each of the remaining nine counts charged them with assaults upon different named persons, at the same time and place, committed by the hurling of rocks. As the non-union men drove in their separate machines to the mill to go to work that morning about 8 o'clock, they were met at the entrance by 25 or 30 pickets who were armed with rocks and were lined up on either side of the road. The defendants, Bundte and Phillips, were among them, and they actively participated in the assaults which followed. Some of the strikers were heard to exclaim "there goes another one of them s-of-b * * * scabs," and expressions of like import. Rocks were thrown by the strikers at all passing cars. Windshields and windows were shattered and the cars were otherwise damaged. Half a dozen of the workmen were seriously injured and sent to the hospital for treatment on that account. Pat Gibson, a truck driver for that company, operated the third car that arrived that morning. He testified that at least twelve rocks were thrown at him as he drove into the premises, most of which struck his machine. One rock broke the windshield and struck him in the head, seriously injuring him. He identified Bundte, Phillips, Sherrad, Moore, McCoard and Pimental, among the other pickets who threw stones at him. After running the gantlet, he parked his car and, in company with another workman, watched, from behind a pile of lumber, the stoning of other machines of non-union workmen as they arrived that day. Stanley Richardson, one of the mill owners, testified that he

arrived just behind the car of Sherman Schwartz and saw both Bundte and Phillips throw rocks at him. Richardson also identified Bundte as one of the men who threw rocks at him as he entered the premises. He also watched other workmen as they arrived, and said that each of them was stoned. There were only fourteen mill employees at that time and they were greatly outnumbered by the strikers. Richardson told them to remain out of sight, while he went to summon an officer. He left from the rear of the building, and, keeping out of sight, he walked a quarter of a mile to the home of Mr. Sorensen where he telephoned to Willets for a taxicab and an officer. In about one hour the deputy sheriff arrived, and the disturbance was quelled.

The first contention of appellants is that the court erred in overruling their demurrer to the indictment, on the chief ground that three counts of riots under Section 404 of the Penal Code, which are misdemeanors, were illegally joined with nine counts of assaults to commit bodily injuries under Section 245 of that code, which are felonies. It is asserted those offenses were improperly joined in the indictment under Section 954 of the Penal Code, because it was not alleged that they grew out of the same transaction, or that they belong to the "same *class* of crimes or offenses."

There is ample evidence to show that each of the offenses charged in the indictment grew out of the same series of connected transactions and that they were inspired by a common purpose on the part of the defendants and their associate strikers to perpetrate the riots and commit the assaults with rocks, of which the defendants were charged. We also think there is adequate proof that the riots and the assaults charged are offenses of the same class or character. They were all perpetrated by the same group of pickets, acting together to win a labor strike by means of force, violence and intimidation, consisting of stoning the non-union workmen with rocks.

We are therefore of the opinion the several offenses were legally united in the indictment, and that the demurrer was properly overruled.

It is true that the first two counts which charged defendants with participating in riots were committed five

days before the riot occurred which is charged in count three, and that the assaults to commit great bodily injuries also occurred on February 4th. It is also true that the last mentioned riot and all of the assaults were committed at a mill owned by a company other than the one which owned the mill where the first two riots occurred. But the same labor troubles existed at both mills which are located in the same vicinity. Strikes existed in both mills. Picket lines had been maintained for the same period of time at both mills. The same group of pickets operated similarly and together at both mills in all the offenses charged. They were all actively engaged together for the same common purpose. All offenses were committed in the same manner by the same means of hurling rocks. We therefore conclude that all offenses charged grew out of the same series of connected transactions, and that they belong to the same class or character of offenses, and were therefore properly united in the indictment.

The general character of the offenses was the same. The riots were alleged in the language of the statute to have occurred, contrary to Section 404 of the Penal Code, by the defendants unlawfully "acting together" to disturb the *public peace* by the use of "force and violence." That force and violence was the throwing of large stones. It was not necessary that a previous agreement between the aggressors should have been alleged, or have existed, to bring such offenses within the inhibitions of Section 404. The strikers might have met lawfully for the purpose of "peaceable picketing", but if the defendants and their associates afterward cooperated and acted together for the unlawful purpose of using force and violence to disturb the public peace, they would nevertheless be guilty of a riot under that section (*State* v. *Stalcup*, 23 N. C. 30; 8 R. C. L. p. 331, sec. 361) Section 404 defines a riot as:

> "Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot."

It is the concurrence of the defendants, unlawfully acting together and with their striking associates, in the use, or threat to unlawfully use force or violence, that constitute the offenses of riots. That section does not depend upon a previous agreement of the parties to exercise force or violence. (54 C. J. p. 832, sec. 6 and cases cited) Section 954, upon which appellants rely, authorizes the uniting in an indictment of "two or more different offenses connected together in their commission," or of "two or more *different offenses of the same class* of crimes or offenses." The statute makes no distinction between misdemeanors and felonies. A misdemeanor and a felony may belong to the same general class of offenses. In the absence of a statute to the contrary, in jurisdictions where, under an indictment for a felony, the defendant may be convicted of a misdemeanor, as he may in California, separate counts for the two offenses, regardless of whether they are misdemeanors or felonies, may be joined in one indictment provided they grow out of the same transaction or belong to the same general class of offenses which are corollary in nature. (42 C. J. S., p. 1140, sec. 180; 27 Am. Jur., p. 690, sec. 132) In the text last cited it is said:

> "Where • • • on an indictment for a felony a conviction for a misdemeanor is allowable, counts for felony and misdemeanor, growing out of the same transaction and of the same general nature and course of trial, may be joined."

And at page 688, section 130, of the last cited authority, it is said in that regard:

> "• • • It is the general rule, • • • that two or more offenses committed by the same person may be joined in the same indictment or information, to meet the exigencies of the evidence, where they are of the same general nature or class of crimes, • • • and where all the offenses grow out of the same transaction *or series of transactions or connected transactions,* even though the property forming the subject

matter of the offense belonged to several different persons." (Italics added)

It is likewise said in 42 Corpus Juris Secundum, at page 1140, section 180:

> "Felonies and misdemeanors may, in some jurisdictions, be joined where charges relate to the same transaction, especially where the misdemeanor is in the nature of a corollary to the *felony*."

And the following paragraph adds that this may be done "although the offenses are of different grades and call for different punishments." (Citing numerous authorities)

The Superior Court had jurisdiction of misdemeanors constituting riots since the penalty is punishment by a fine in excess of $1000 and by imprisonment not exceeding six months. (Penal Code, sec. 1425, *People* v. *Brenta*, 64 Cal. App. 91) The penalty for riots is imprisonment not exceeding two years, or a fine not exceeding $2000. (Penal Code, sec. 405)

It was not necessary that all of the charged offenses should have grown out of the same transaction, and that they should have occurred on the same date, or that they were perpetrated against the same person or company. It was sufficient to render the joining of the counts of the indictment valid provided the offenses were of the *same class*, or as the Supreme Court recently said, "If there is a common element of substantial importance in their commission." (In re *Pearson*, 30 Cal. 2d 871) In the case last cited the defendant was charged in one information with thirteen separate counts of different offenses, consisting of kidnapping, robbery and assaults with deadly weapons, committed on different dates and upon different persons. He was convicted of all felonies. On petition to the Supreme Court for a writ of habeas corpus, he contended that the judgment was void because there was a lack of authority to unite in one information under Section 954 of the Penal Code such "unrelated felony counts." The writ was discharged. In response to petitioner's contention, the

court held that the various offenses were properly united in different counts of the same information. It said:

> "• • • Even on appeal, it appears, they would not have been cause for reversal. Joinder of distinct offenses is proper *'if there is a common element of substantial importance in their commission.'* (People v. Scott (1944), 24 Cal. 2d 774, 778 [151 P. 2d 517]). The consolidation of a group of charges similar to those against petitioner was upheld in People *v.* Duane (1942), 21 Cal. 2d 71, 74-77 (130 P. 2d 123), where the 'common element' was a plan to rob managers of Safeway Stores. In any event, the question of consolidation or severance is procedural and not, as petitioner contends, jurisdictional." (Italics added)

Regarding the guilt of all who participate in, or who promote or encourage, a riot, it is said in 8 Ruling Case Law, page 331, section 361, supported by authorities, that:

> "• • • All who encourage, incite, promote, or take part in a riot are guilty of riot as principals; and a person, to be guilty as a rioter, need not be actively engaged, but if present giving support, countenance, etc., it is sufficient; but mere presence alone is not sufficient to constitute one a rioter."

Moreover, the demurrer to the indictment in this case was to the asserted invalidity of the instrument as a whole. It did not apply to any particular court. The misjoinder of offenses separately charged will not invalidate the indictment as a whole, if any single count therein is sufficient in form and substance to charge a public offense. (*Culjak* v. *United States*, 53 Fed. 2d 554, 82 A. L. R. 480, at page 482; 27 Am. Jur., p. 687, sec. 129) In this case the defendants were not prejudiced by the joining of the various counts. All of the evidence with respect to each count applied to both defendants. They did not move for separate trials of the felonies and the misdemeanors, or as to themselves individually. The evidence of the throwing of stones and of participation in the riots by other striking associates

was competent, since there is adequate proof that the defendants were present during all of the affrays and not only threw stones themselves, but also aided and encouraged the other strikers by their conduct, statements and active participation in the force and violence which was exercised. In our judgment, the demurrer was therefore properly overruled. There is nothing in the authorities cited by appellants in conflict with the foregoing conclusion with respect to the proper joining of the different offenses in the indictment.

For the foregoing reasons, we are of the opinion the defendants' motion for directed verdicts was also properly denied. We think there is adequate evidence to show that the defendants were guilty of the riots charged under Section 404 of the Penal Code by "acting together" in disturbing the public peace by the concerted use of force and violence, to wit, the throwing of large rocks at the persons and automobiles of the employees of the mills. There is substantial evidence that the defendants aided, abetted and encouraged their striking associates in attacking the employees and in threatening and attempting to intimidate them from pursuing their lawful employment in the mills. Section 31 of the Penal Code makes all persons concerned in the commission of either a misdemeanor or a felony guilty as principals, if they directly commit the offense or aid, abet or encourage its commission.

The appellants contend that the court erred in receiving evidence under some of the separate counts charging them with assaults on February 4th, "by means of force likely to produce great bodily injury, to wit, by throwing rocks at said —— —— —— ——," and in receiving in evidence the rocks so thrown, without proof that the defendants personally threw them. It is argued that in charging the defendants, as principals, with actually throwing the rocks the prosecution was bound by such allegations and must prove that the defendants themselves threw the rocks, and that evidence of other strikers throwing rocks, on the theory that the defendants aided and abetted the commission of the assaults, or otherwise, was incompetent, citing *People* v. *Carson*, 155 Cal. 164, and other similar cases.

For the same reason, the appellants claim that the court erred in instructing the jury, in the language of Section 31 of the Penal Code, that if the defendants aided, abetted or encouraged the commission of the assaults with rocks by other strikers, they would be deemed to be principals in the assaults, even though there was an absence of proof that the defendants themselves actually threw the rocks. It is asserted Section 31 is not applicable to this case in view of the allegations of the indictment. We cannot agree with appellants' contention in that regard. We think the challenged evidence is competent, and that the prosecution was not precluded from showing that the defendants aided, abetted and encouraged other strikers to commit the assaults by throwing rocks and that they were therefore guilty as principals even though in some instances the throwers of the rocks were not identified. In the last nine counts the defendants were charged with assaults by the throwing of rocks at a specified person named in each count, to wit: Pullen, Schwartz, Gibson, Jackson, Wise, Henderson, Mays, Tennison and Ray. In most cases windshields and windows were broken and the cars were damaged. Several of the drivers of the cars were struck and seriously injured. Half a dozen of them were taken to a hospital and treated. In most cases the defendants were identified by either the drivers of the cars or by other employees of the mill as the persons who actually threw the rocks. In some three or four charges that evidence is lacking. But in no instance is there a lack of evidence that large rocks were thrown at such drivers of machines by some of the strikers. The rocks which were introduced in evidence were identified as those which shattered the windows of the cars and were found in such cars or upon the running boards thereof. We think such rocks were sufficiently identified and properly received in evidence. The motion to strike out that evidence was also properly denied.

The evidence is clear that all of the strikers, including both defendants, assembled at the entrance to the mill before eight o'clock in the morning with the concerted purpose of attacking the non-union workmen when they arrived. The strikers lined up on either side of the road and armed themselves with rocks. They bombarded every machine

that drove into the premises that morning. The attack was made only with stones, as charged. The acts, conduct and statements of the defendants and other strikers clearly indicate that they all cooperated in each of said alleged assaults. Each of them might have been charged and convicted of the riots and assaults. It is immaterial that only the defendants were so charged. There is no variance from the charges in the use of weapons, to wit, rocks, with which the crimes were perpetrated. No weapons, other than the rocks, were used in committing the assaults. Certainly it may not be asserted that if a defendant picked up a rock and handed it to another one of the strikers, telling him to take it and hurl it at the driver of a car, that the defendant would not be guilty of that assault as a principal. We conclude that, under the circumstances of this case, the defendants became guilty of the assaults as principals, in spite of the fact that, in three or four instances, the defendants were not definitely identified as the particular persons who threw the rocks. We are convinced that the evidence was competent as a part of a concerted purpose to commit the offenses, and that the court correctly instructed the jury that Section 31 of the Penal Code was applicable to this case.

The case of *People* v. *Carson, supra,* upon which the appellants rely, is not in point. The defendant in that case was serving a life sentence at Folsom state prison. He and several other prisoners planned to escape. Several of them were armed with improvised knives. The defendant picked up a chisel, which he claimed he did not use. There was no direct evidence that he did use the chisel. Two guards, Murphy and Jolly, were attacked. The attack was led by prisoners other than the defendant. Both guards were stabbed with knives and overpowered. The prisoners took the guards as a shield and attempted to escape. Some of them were shot and killed. The defendant was captured. He was indicted under Section 246 of the Penal Code, as it then existed, but subsequently repealed (Stats. 1941, ch. 106, sec. 16), for an assault with a deadly weapon, to wit, a chisel. He was convicted and sentenced to the death penalty. Knives found at the scene of the shooting, but

not connected with defendant's possession, were received in evidence. The Supreme Court said that "*The theory of the prosecution* was that appellant, with the other prisoners engaged in the assault, had entered into a conspiracy to escape." The evidence showed that "a conspiracy had been entered into between some of these prisoners to attempt to escape." At the trial, defendant's objection to evidence of the assaults and conduct of other prisoners, *before proof of any conspiracy* was made, was overruled. On appeal the defendant contended that the evidence of assaults *with knives by the other prisoners* was incompetent and prejudicial and that there was no evidence of an assault by the defendant with a chisel, as alleged in the indictment. The Supreme Court held that the evidence of the conduct and assaults with knives by the other prisoners was competent; that the evidence of a conspiracy to escape from prison was competent to show the *intent* with which the defendant participated in the assault upon the prison officers, and that the knives were properly admitted in evidence. The judgment of conviction was affirmed. The court said:

> "• • • There was sufficient evidence in the case to warrant the jury in finding that there was a conspiracy among the prisoners • • • and that the defendant was a party to it. • • • Nor was the evidence subject to a motion to strike it out on the ground that as defendant was charged in the indictment specifically with an assault • • • with • • • a chisel • • • he could not be convicted by proof that an assault was made by the other prisoners • • • with knives. • • •
>
> " • • • Nor is it of any consequence that the defendant was charged with an assault with a chisel and not with a knife."

The Court further said:

> "• • • The knife found where defendant fell, together with the other knives found, all in proximity to where the defendant and the other prisoners were

gathered, * * * were admissible in evidence, together with all the circumstances accompanying the assault, as bearing on the question of the conspiracy, * * * and also as evidence of the intent with which the assault in general was made by all the prisoners."

In the opinion in the foregoing case the Supreme Court did say, at page 174, with relation to the application of Section 31 of the Penal Code, upon the language of which the appellant relied, that:

> "But as he (the defendant) was charged with an assault with a weapon of specific character he could only be convicted by proof of an assault made by him with the weapon charged, and the theory of responsibility as an aider and abettor in an assault made by the other prisoners *with other weapons* was either tenable nor permissible under the indictment against him. But *as appellant does not make any complaint on this appeal as to this theory, * * * it is unnecessary to further discuss the proposition.*" (Italics added.)

It will be observed that the court specifically refrained from determining that suggested principle as to whether a defendant who is definitely charged with an assault with a particular weapon of a specified type might be convicted of *an assault made with an entirely different weapon used by other persons* on the doctrine of aiding and abetting the assault of other persons. The defendant was specifically charged with making the assault with a chisel. The other prisoners actually assaulted and stabbed the officers with improvised knives. What was said by the court about liability of the defendant for merely aiding and abetting his associates is therefore mere dictum. It applies to facts entirely different from those of the present case. In this case there could have been no variance of proof as to the character of weapons used. In this case the defendants were charged with making the assault with rocks only. There was no proof of any other character of weapon used by either the defendants or their associates. Moreover, the court definitely held in the Carson case that the evidence of

the conspiracy to escape was admissible to illustrate any fact involved, to shed light on any issue, to show the *intent* with which the assault was made and to show the nature of the wounds inflicted or the damages incurred as a result of the acts with which the accused person is charged. That rule applies to both civil and criminal cases.

The photographs were also competent. (*Packard* v. *Moore*, 9 Cal.(2d) 571, 581; Underhill's Criminal Evidence (4th Ed.) p. 157, sec. 117; 8 Cal. Jur., p. 136, sec. 223; 10 Cal. Jur., p. 896, sec. 169; 23 C. J. S., p. 51, sec. 852; 159 A. L. R., p. 1414, note.) In the Packard case, supra, which was a suit for personal injuries received as the result of an automobile collision, a photograph of plaintiff taken while she was in the hospital, showing the wound on her face which was received in the accident, was admitted in evidence over defendant's objection. The court said:

> "Appellant's objection to the introduction of photographs of the plaintiff showing the nature of the injuries upon her face while in the hospital is without merit. The photographs portrayed possibly more strikingly plaintiff's injuries than oral testimony could have done. This fact did not render them inadmissible. The jury was entitled to know of her true condition and if that fact could be more accurately portrayed by photographs than by the testimony of the doctor, or others, it was the right of the plaintiff to resort to that method of proof. (Citing authorities)."

The sufficiency of the preliminary proof for admission of a photograph is within the sound discretion of the trial judge, and where there is substantial evidence of adequate foundation for its admission, that discretion will not be interfered with on appeal. (10 Cal. Jur., p. 896, sec. 169). It would seem to follow that if a photograph of a person is competent to show the condition of a wound on the face, as it was in the Packard case, upon the same principle a photograph showing the damages incurred to automobiles as a result of unlawful assaults by means of throwing rocks should also be competent. The photographs of the automobiles were taken immediately after the assaults occurred.

There is ample evidence to show they were in the condition which existed immediately following the assaults. Photographs are competent for the same reason that diagrams and maps are admissible to show the relative location of objects and the surrounding physical conditions. Photographs of weapons, instruments and objects involved in the issues are likewise admissible for similar purposes. (*People* v. *Carson*, supra; *People* v. *Shaver*, 7 Cal. 2d 586, 591; *People* v. *Sambrano*, 33 Cal. App. 2d 200, 213; *People* v. *Singh*, 78 Cal. App. 476, 483; *People* v. *Jackson*, 74 Cal. App. 2d 22, 25.) The Court did not err in receiving the photographs in evidence.

The case of *People* v. *McCall*, 10 Cal. App. 2d 503, upon which appellants rely in support of their assertion that the court erred in receiving in evidence the photographs, is not in point. In that case the defendant was charged and convicted of manslaughter. He and the deceased were intoxicated and driving together in the latter's automobile. No other person was present. The question of a conspiracy or of other persons cooperating in the assault was not involved. The deceased, Hubbard, was driving. The car stalled. Hubbard got out and cranked it. McCall, the defendant, took the driver's seat. The deceased insisted on continuing to drive the car. A controversy arose. "McCall got out of the car and hit Hubbard two or three times on the face, knocking him to the pavement." He was taken to a hospital and died. The skull was found to be fractured. An automobile jack, wrench and tire-iron were found in the back of the car. They were received in evidence over the objection of the defendant. The Court said, "There was no evidence which connected the appellant with any of the implements. The car was not his." The court concluded that it was prejudicial "to exhibit to the jury all of the implements that were found in the car of the deceased, *upon the sole ground that if any one of them had been used, it might have caused the injury which resulted in death.*" The judgment was reversed on that ground. In the present case evidence of the injuries to persons and the damages to their cars were shown to have been caused by the rocks which were actually thrown by the defendants or by their

associates with whom they were then unlawfully acting in a common cause or purpose to commit the offenses.

Other cases cited by the appellants upon that issue may be similarly distinguished.

Finally, a motion in arrest of judgment was made on the previously stated grounds. For the reasons heretofore assigned, that motion was properly denied.

The judgment and the order denying a new trial are affirmed.

THOMPSON, J.

We concur:
ADAMS, P. J.
PEEK, J.

Filed September 28, 1948. George N. Didion, Clerk.

APPENDIX II

(Vol. . . . A. C. A. . . .)

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

3 Criminal No. 2024

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent*

vs.

JOHN BUNDTE AND WILLIAM PHILLIPS, *Defendants and Appellants*

BY THE COURT

On application for rehearing the opinion filed by this court on September 28, 1948, is modified by striking out the language on page 10 of the typewritten decision, beginning on line 9 from the bottom, and reading as follows:

"They did not move for separate trials of the felonies and the misdemeanors, or as to themselves individually."

On page 11, after line 15 from the top, add the following paragraph:

"There is no merit in appellants' contention that the court erred in denying their application for separate trials. Section 1098 of the Penal Code provides in part: 'When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials.' It has been repeatedly held that a defendant so charged is not entitled as a matter of right to a separate trial. The question of the right to a severance of trial is addressed to the sound discretion of the trial court, with which decisions we may not interfere, except upon a clear abuse of that discretion. (People *v.* Isby, 30 Cal. 2d 879, 897; People *v.* Goold, 215 Cal. 763; 4 Cal. Jur., Ten-Year Supp. 718, sec. 268; 104 A. L. R. 1519, note)"

With the foregoing modifications, the opinion, as filed, is approved, and the petition for rehearing is denied.

Filed October 13, 1948. George N. Didion, Clerk.

APPENDIX III

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

3 Criminal No. 2024

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent*

vs.

JOHN BUNDTE AND WILLIAM PHILLIPS, *Defendants and Appellants*

APPELLANTS' PETITION FOR A HEARING DENIED

CARTER, J. VOTING FOR HEARING

October 25, 1948